Supreme Court of the United States

October Term, 1942

No. 191

ALBERT F. COYLE
Petitioner

v.

THE PEOPLE OF THE STATE OF NEW YORK
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

RESPONDENT'S BRIEF

FRANK S. HOGAN
District Attorney
New York County

STANLEY H. FULD
Assistant District Attorney

DAVID RIESMAN
Deputy Assistant District Attorney

Of Counsel

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RESPONDENT'S BRIEF

Opinion Below

The petitioner was convicted in the Court of Special Sessions, New York County. The judgment was affirmed by the Appellate Division of the Supreme Court of the State of New York, First Department, on February 6, 1942 (263 App. Div. 937), and by the Court of Appeals of New York State, on December 3, 1942 (289 N. Y. 169), in both instances without opinion. A motion for reargument in the Court of Appeals was denied on April 23, 1943, also without opinion.

Jurisdiction

Jurisdiction is invoked under sections 237 (b) and 240 (a) of the Judicial Code, but no grounds stated in Rule 38, subdivision 5, of this Court are presented by the petition or otherwise appear in the case.

Questions Presented

The petitioner urges (1) that the activities for which he was convicted lay outside the jurisdiction of New York State and wholly in the federal jurisdiction; (2) that the information was defective and that consequently he did not receive a fair trial; and (3) that he was denied a jury trial.

The Statute

Section 270 of the Penal Law, so far as here pertinent, reads:

> **"Practicing or appearing as attorney without being admitted and registered.**
>
> "It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as attorney and counselor-at-law for a person other than himself in a court of record in this state or in any court in the city of New York, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law or counselor-at-law, or attorney, or counselor, or attorney and counsellor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath and without having subscribed and taken the oath or affirmation required by section four hundred and sixty-eight of the judiciary law and filed the same in the office of the clerk of the court of appeals as required by said section."

Statement

A Grand Jury drawn for the Court of General Sessions of the County of New York directed the District Attorney of that county to file an information in the Court of Special Sessions of the City of New York against the petitioner, Albert F. Coyle, for the crime of practicing as an attorney without being admitted and registered (Penal Law, § 270), a misdeameanor. He was convicted by that Court and the resulting conviction was unanimously affirmed by the Appellate Division and by the Court of Appeals, in both instances without opinion, and a motion for reargument in the Court of Appeals was denied.

It is not necessary to examine petitioner's claims at length upon the merits. Since, however, his petition for certiorari, and his brief in support thereof, give a misleading impression of the activities for which he was convicted, it is necessary to refer briefly to the evidence adduced at the trial which demonstrated that the petitioner was not licensed to practice law in New York State or in any other jurisdiction, but that he nevertheless held himself out as a lawyer, represented a large number of persons, and rendered a variety of ordinary legal services.

For almost ten years prior to the trial, Coyle had his offices, and was associated, with attorneys (502-3, 531-2, 713, 725).* From 1937 on, he maintained his own office, where he employed lawyers and law school graduates, and handled a variety of legal business (502-3, 534-7, 725-8). On the corridor door appeared his legend (77, 85, 180, 290, 334):

> "Albert F. Coyle
> International Law"

Moreover, he was listed in the "Red Book" or classified telephone directory under the classification of "Lawyers" (395-6, Peo's Exh. 12).

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* References are to folios of the printed record.

Further, in dealing with those whom he termed his "clients", with members of the Bar, and with others, he represented himself—or permitted himself to be addressed—as a "lawyer"; for instance, he told the witness Auerbach—an inspector of the Department of Labor—that he was "an American lawyer" and that he was "practicing in New York" (80). The record is replete with similar instances (100-1, 118-23, 133-6, 200-1, 342).

On a number of occasions the petitioner wrote letters conveying the unmistakable implication that he was a lawyer; his "International Law" letterhead, his repeated references to his "clients", his formal demands for satisfaction, his threats to file suit—these were capable of no other interpretation (Peo's Exhs. 6, 7, 10, 15).

The petitioner, according to his own trial testimony, specialized in handling immigration and naturalization cases before the Labor, Justice and State Departments, and in "international law" cases involving representation of creditors of foreign concerns, "proxy marriage", and like matters (515, 675-7, 679-82, 683-4, 866-7; see, also, Peo's Exh. 21).

ARGUMENT

I

No federal question was presented

Not one of the issues here raised was presented as a federal question at the trial, or in the voluminous briefs filed in the appellate courts. Nor has there been any attempt to have the Court of Appeals amend its remittitur to show that an inescapable federal question was presented to and passed upon by that court. [See, *e. g., Lynch* v. *New York* (1934) 293 U. S. 52, 54-55.]

II

The petitioner's claim that his practice was confined to appearances before federal departments

The petitioner, ignoring a series of proven incidents of typical legal work—the pressing of a client's claim for damage to a suit of clothes (Peo's Exhs. 6, 7), attempts to collect a judgment for another client (1085-7), the incorporation of a New York corporation (217-8, 239-40, 1073; Peo's Exh. 5), and like matters (744-50, 803, 834-5)—seeks to convey the misleading impression that he was convicted for practicing solely before federal departments in immigration and naturalization cases. The record shows that the People did not rely upon these activities as a part of their case—even though, as carried on by him, they would have fallen within the prohibitions of section 270 of the Penal Law.[1]

Thus, it is obvious that no question is presented on this record concerning the privilege of a person not hold-

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1. That the petitioner's privilege of appearing before immigration and naturalization bureaus—a privilege extended to anyone not proven to be of bad moral character (see Rules of Immigration and Naturalization Service, Rule 28, subdivision A, Par 1)—did not justify petitioner in holding himself out as a lawyer—even as an "international lawyer"—is assumed by that same rule, which provides (Par. 1):

> "It shall be requisite to the admission of attorneys or counsellors to practice before the Department or any immigration station or office that they shall be attorneys in good standing in the courts of the State, Territory, or insular possession to which they respectively belong."

Moreover, it needs no argument here that the right to practice law within the confines of a state, even before federal departments, requires membership, if not in the Bar of that state, at least in the Bar of some state, and, indeed, the petitioner's counsel on this application refers to the fact that he is a member of the Bar of the State of New York as well as of that of this Court. (See Revised Rules of the Supreme Court of the United States, Rule 2, subdivision 1.)

ing himself out as a lawyer to represent citizens of a state before federal departments in accordance with the rules of the latter.

Beyond that, the issue here urged was posed below solely as one of the interpretation of the scope—as a matter of state law—of section 270 of the Penal Law.

III

The petitioner's claim that he was denied a bill of particulars and a jury trial

The petitioner contends that he was denied a fair trial because of the failure to furnish him a bill of particulars and because of the refusal to give him a jury trial. Both contentions, not presented as federal questions in any stage of the litigation, are wholly without merit.

A. The information was sufficient

The petitioner claims that he was brought to trial upon an information so gravely deficient in specificity as, in the absence of a bill of particulars, to violate his constitutional rights. The information charged that (23):

> "The defendant, from in or about the month of January, 1938, continuously, and at all times to in or about the month of November, 1940, in the County of New York, held himself out to the public as being entitled to practice law * * *."

It will be apparent that the information adequately notified the defendant "of the nature and character of the crime charged." [See *People* v. *Williams* (1926) 243 N. Y. 162, 165.] The question of the sufficiency of the information was the principal legal point raised upon the appeal—solely as a matter of state law (see Petitioner's Court of Appeals brief, Point I, pp. 5-28).

B. No jury trial was required

That the denial of a jury trial by a state presents no federal question also needs no argument here. [See, *e.g., Walker* v. *Sauvinet* (1875) 92 U. S. 90; *Palko* v. *Connecticut* (1937) 302 U. S. 319, 324; *Hurtado* v. *California* (1884) 110 U. S. 516.] The petitioner's apparent claim that he was deprived of the right to a trial by jury conferred by Article 1, Section 2 of the New York *State* Constitution—a contention of course entirely without merit in misdemeanor cases [see *People ex rel. Frank* v. *McCann* (1930) 253 N. Y. 221, 225-227]—likewise presents no *federal* question. Here also, of course, no federal question was raised at any stage of the trial.

Conclusion

It is plain that the petitioner seeks merely to reargue at this Bar the issues of fact and of state law already decided adversely to him. In seeking to do so he has attempted to give this Court an utterly erroneous impression of the record and to present, as a feeble afterthought, a number of fanciful federal questions never previously raised.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
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New York County

STANLEY H. FULD
Assistant District Attorney
DAVID RIESMAN
Deputy Assistant District Attorney
Of Counsel

June, 1943.

(18)

Supreme Court of the United States

October Term, 1943

No. 191

ALBERT F. COYLE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

MOTION AND BRIEF AS AMICUS CURIAE

WALTER H. BOND
EDWIN M. BORCHARD
MORTON BRAUER
I. ENSELMAN
JAMES W. GERARD
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As Amicus Curiae

JEFFREY PRESS, INC.

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Motion for Leave to File Brief as Amicus Curiae.

May It Please the Court:

The undersigned, on behalf of himself and the following former members of the Bench, professors of International Law, and members of the Bars of the States of New York and New Jersey and the Commonwealths of Massachusetts and Pennsylvania, respectively, does hereby respectfully move this Honorable Court for leave to file the accompanying brief in this cause as *amicus curiae*.

This leave is sought because the undersigned believe that important Federal questions affecting the constitutional rights and civil liberties not only of this petitioner but also of all other persons similarly situated are implicit in this cause, which questions merit the condign consideration of this Honorable Court.

The undersigned are not interested pecuniarily in any way herein. They have undertaken to prepare and submit the annexed brief solely out of a sense of responsibility in

the impartial administration of justice to all men, and their serious conviction that this particular petitioner has been deprived of a fair trial by due process of law.

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SAMSON SELIG, ESQ.

By

as Amicus Curiae.

SUPREME COURT OF THE UNITED STATES

October Term, 1943

[SAME TITLE]

BRIEF AS AMICUS CURIAE.

We respectfully submit to this Honorable Court the following brief as *amicus curiae* in support of the petition of Albert F. Coyle for rehearing on his petition for a writ of *certiorari* herein. Representing as we do former members of the Bench and a Judge Advocate of the United States Army, two professors of Law and members of the Bar of this Court and of the States of New York and New Jersey and the Commonwealths of Massachusetts and Pennsylvania, we join in this brief because we believe that the petitioner has been deprived of his constitutional rights by the trial court, and grave injustice has been done him which only this Court can now correct, and that the cause involves Federal questions which should be reviewed by this Court. Consent for the filing of this brief has been obtained from David P. Siegel, Esq., counsel for petitioner, and Stanley H. Fuld, Esq., counsel for respondent.

I. Preliminary Statement.

The salient facts of this case are briefly these: The petitioner was educated for the Law at Stanford University and served several years in the office of the City Attorney at Palo Alto, California, followed by graduate work at Yale University and studies abroad in International Law. Because of his training, experience and ability in the international field and his competence in five European languages, he built up a practice in adjusting foreign claims, including defaulted foreign bond issues of large amounts, in addition to handling, with his office staff, from 1400 to 1500 immigration cases for European refugees, and is credited with obtaining the release of more political pris-

oners from Nazi concentration camps than did any other American. He also served in various positions of trust and confidence, was Secretary of the American Commission on Conditions in Ireland, and is the author of a standard source-book on Ireland as well as various monographs on international matters (R. 495-507, 511-15, 691, 971-72). He was not interested in New York law and was not a member of the New York Bar. In fact, the evidence shows clearly that he made it a practice to refer to competent New York attorneys matters pertaining to New York law (R. 534-39, 663, 963-64, 988). The petitioner's right to act in such international and federal departmental matters without being admitted to the New York Bar was upheld in three civil suits by New York Courts (R. 1055-56 and Petition for *Certiorari* herein, pp. 8-10). Nevertheless, the New York County Lawyer's Association, in its ardent zeal to protect the perquisites of the legal profession, secured an information charging the petitioner with "practicing as an attorney without being admitted and registered" in violation of Sec. 270 of the New York Penal Law, with the sole specification that he had "held himself out to the public as being entitled to practice law" (R. 23). Since the information contained no indication as to the specific nature and cause of the illegal acts alleged against him, the petitioner sought a bill of particulars, as detailed under Point 3 of his Petition for Rehearing filed herein. This was summarily denied him, so that he went to trial without an opportunity to prepare any defense or subpoena witnesses or documents to prove his innocence of any specific illegal act, thus depriving him of the first essential of a fair trial. He was then tried by three judges of the Court of Special Sessions of the City of New York. Two of these judges, unknown to the petitioner, were active members of the prosecuting County Lawyers' Association. His counsel's motion at the opening of the trial to dismiss the information as insufficient on its face was denied (R. 53, 68), although the one judge of the court who was not a member

of the prosecuting Association protested that "There ought to be some additional information" (R. 70). Seven surprise witnesses were adduced by the People, all of whom, with the sole exception of a government-employed *agent provocateur,* swore that the petitioner had never told them he was a New York lawyer, nor had he ever attempted to handle any legal matter for any of them in any New York court; and even the *agent provocateur* admitted that he had come to petitioner's office with a false story about a non-existent immigration matter having nothing to do with the practice of law in New York. In the face of the utter absence of any evidence whatsoever that the petitioner had ever practiced law in New York, the admission of the People that he had not done so (R. 375), and the utter lack of any competent evidence that he had held himself out to do so, the one judge on the court who was not a member of the prosecuting Association voted to dismiss the information at the end of the People's case and again at the end of the trial. The two judges who were members of the prosecuting Association voted to convict.

II. Summary of the Argument.

The petitioner's appeals to the New York appellate courts having been denied without any opinion, he seeks a writ of *certiorari* from this Court. We believe that this writ should be granted on the following grounds involving Federal questions which should be reviewed by this Court:

POINT A: The petitioner was denied a fair trial by an impartial trial tribunal. He was brought to trial without any presentment as to the nature and cause of the specific illegal acts for which he was to be tried, before a trial tribunal of which the majority members were also members of the prosecuting Association, sitting as judges, jury and prosecutors combined.

POINT B: The petitioner suffered a discrimination in his civil rights, in violation of Art. I, Sec. 11 of the Constitution of the State of New York and Art. XIV, Clause 1, Constitution of the United States, in that he was not granted a jury trial when such trials are granted for similar offenses in other New York Courts.

POINT C: The activities of the petitioner were beyond the jurisdiction of the court and the scope of Sec. 270 of the New York Penal Law. The court exceeded its proper jurisdiction in trying the petitioner for his activities in connection with Federal departmental and international matters not in litigation in any New York Court.

POINT D: The trial court should have dismissed the information as defective and insufficient on its face. The information charged the petitioner with practicing New York law, which the People admitted in open court that he had never done. The sole specification under that charge related to an alleged offense not contained in the charge, at variance with it, and devoid of any information as to the specific illegal acts charged.

POINT E: There was no legal or competent evidence to support the judgment. Every witness at the trial swore that the petitioner had never represented himself as a New York lawyer, with the sole exception of a government-employed *agent provocateur* whose testimony should have been excluded by the court under the rule against entrapment.

POINT A.

The petitioner was denied a fair trial by an impartial trial tribunal.

The New York County Lawyers' Association instigated the prosecution of the petitioner. Its representative appeared in Court against him, and wrote the Court about the case (R. 1059-60). It filed two briefs against him, in which it frankly admitted assisting the prosecution. The petitioner was tried without a jury before three judges, two of whom were active members of the prosecuting Association, and voted against the defendant. The third judge was not a member of that Association, and voted to dismiss the information both at the end of the People's case and at the close of the trial, and strongly differed with the other two judges throughout the trial on the main issues. (See statements of Mr. Justice Troy cited under Point 4 of Petition for Rehearing.) Since this was an Association matter, the two judges who were members of the Association should have excused themselves from sitting in the case. They may be deemed to have been interested judges, interested not pecuniarily but interested professionally in the plaintiff's case. The record is replete with instances where these two judges were hostile to the defendant. Since these two judges did not disclose their membership in the prosecuting Association at the trial, and it was only recently discovered by the petitioner, he could not have objected to it at the trial. But since the matter is jurisdictional, it may be brought up at any time. This Court might even take judicial notice of the fact that Mr. Coyle was tried not by impartial judges but by two partial judges. The first precept in the administration of justice is that a judge must be free from all bias and partiality (*Oakley* v. *Aspinwall*, 3 N. Y. 547, 549). As Chief Justice Taft declared in *Tumey* v. *Ohio* (273 U. S. 510, 535):

> "No matter what the evidence was against him, he had the right to have an impartial judge."

The petitioner was not only denied a fair trial because the majority of the Court was partial and interested professionally in convicting him, but also because the Court refused to grant him a bill of particulars to apprise him as to the specific illegal acts for which he was to be tried. We cannot too strongly condemn the unfairness of any trial where the accused is denied a specific statement of the nature and cause of the alleged illegal acts. Such a presentment was especially necessary in the present case, where the sole charge in the information, "Practicing as an attorney without being admitted and registered" (R. 23), was withdrawn by the prosecution at the trial (R. 375), and the defendant was tried instead on the only specification given, a vague blanket allegation without the slightest indication as to the time, place, dates, or manner in which the alleged "holding out as an attorney" occurred, except that it was in the County of New York between January, 1938 and November, 1940, during which years the record shows that the petitioner handled between 1400 and 1500 immigration cases (R. 515). The petitioner properly sought a bill of particulars, which was summarily denied by the Court when the one judge who was not a member of the prosecuting Association was not on the bench (R. 28, 31-44). The petitioner then moved to dismiss the information as insufficient on its face, which was likewise denied, with exception duly taken (R. 53, 68), although the one independent judge on the trial tribunal protested:

> "There ought to be some additional information. A mere accusation that somebody is aleged to have violated the law has been repeatedly held to have been insufficient" (R. 70).

After the trial the petitioner's counsel moved in arrest of judgment on the ground that the information failed to

specify the acts constituting the crime charged, which was also denied, and exception taken (R. 1011-12).

We need hardly remind this Court that to send a man to trial on such a blind blanket accusation is to nullify the right to have counsel, prevent him from preparing any intelligent defense, and handicap him in eliciting favorable testimony through examination of witnesses or rebutting false charges by subpoenaing witnesses and documents. This is in glaring contract to the many months which the prosecuting Lawyers' Association and the People had to prepare the prosecution, secure surprise witnesses, search unhampered through the files and records of the petitioner, marshall documents from far and near, and even seek to manufacture evidence by the use of *agents provocateurs*. The injury to the defendant's rights is aggravated by the fact that, under a recent amendment to the New York law, the names of the witnesses against the accused can be withheld from him, so that, in the instant case, all witnesses adduced by the prosecution were surprise witnesses.

This Court has repeatedly protected the constitutional right of a defendant to be apprised of the crime charged against him with such certainty that he can make his defense and protect himself against another prosecution for the same offense. *Rosen* v. *U. S.*, 161 U. S. 29; *Bartell* v. *U. S.*, 227 U. S. 427.

The very point at issue here was decided by the New York Court of Appeals in the leading case of *People* v. *Zambounis*, 251 N. Y. 94, the Court, per Crane, J., stating:

> "The requirement that an indictment and an information must state the crime with which the defendant is charged, and the particular acts constituting that crime, is more than a technicality: it is fundamental, a basic principle of justice and fair dealing, as well as a rule of law" (p. 96).

Within the past month Mr. Justice Louis A. Valente of the New York Supreme Court has rendered a well-considered opinion on this same point. In the case of *People* v. *Berkeley* (N. Y. Law Journal, Oct. 14, 1943, p. 924, cols. 2 and 3) the Court upheld the defendant's contention that the information was fatally defective because it contained no more specific information than the date on which the alleged offense occurred. (In the instant case, no exact date was given, but only a period of nearly three years.) Mr. Justice Valente criticized the argument by the People that it is unnecessary to set forth such detail as the place where a crime is alleged to have been committed, stating:

> "I cannot conceive how it can be claimed that an allegation relating to the place where a crime is committed is a mere techincality which may be omitted, particularly when it is not supplemented by a bill of particulars."

The error of the trial Court in refusing this petitioner a bill of particulars led to all sorts of abuses at the trial, permitting the prosecution to bring in such extraneous matters as a conversation in German at Paris, France; letters to foreign countries about international matters; an unsolicited note of introduction written about the petitioner by a third party to a fourth party in Haiti; the collection of a debt arising in Berlin from a debtor in California for a creditor in Palestine; the proper fee to be charged in a federal immigration case (R. 145-52, 551-90, 594-95, 704-7, 731-33, 809-14). All these and many other Federal departmental and foreign matters, entirely beyond the scope of the New York penal law and the jurisdiction of the Court, the two members of the tribunal who were at the same time judges, jury and members of the prosecuting Association permitted the prosecution to drag in under this blanket information, the charge of which ("practicing as an attorney") was admittedly untrue, and the *non*

sequitur specification of which (holding out as entitled to practice law) was vague and indefinite and entirely devoid of any presentment as to the nature and cause of any specific illegal act.

As shown above, this Court has repeatedly held that the denial by a state Court of a fair trial by reason of partial judges or by failure to apprise the accused of the specific illegal acts alleged against him creates a constitutional question on which the petitioner can rightfully invoke the protection of this Court. Here both of these essential elements of a fair trial were lacking, which alone should warrant the granting of a writ of *certiorari* by this Court.

POINT B.

The petitioner suffered an unconstitutional discrimination in his civil rights by denial of a jury trial.

While we cannot concur with the petitioner that the comity clause of the Federal constitution entitles him to a jury trial in the State of New York see Petition for Rehearing, Point 2), we believe that his right to a jury trial rests on other and more solid ground. The Constitution of New York, after guaranteeing a jury trial in criminal cases (Art. I, Sec. 2) later provides:

> "Courts of Special Sessions and inferior local courts of similar character shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law, and the legislature may authorize them to try such offenses without a jury." (Art. VI, Sec. 18, N. Y. Constitution.)

Under this authority the legislature of New York adopted the Inferior Criminal Court Act, Article 3, Section 31, of which confers jurisdictional powers on the Court of Special Sessions of the City of New York. An examination of

the statutes shows that it does not anywhere specifically authorize the said Court of Special Sessions to try misdemeanors without a jury. The Court has taken that power merely by implication. Clearly, the Constitutional rights to trial by jury guaranteed in Article I, Section 2, of the New York State Constitution cannot be taken away by vague statutory implication, and the jurisdiction thus acquired is invalid and unconstitutional.

Moreover, even if the legislature had acted properly under the authority conceded by Article 6, Section 18 of the New York Constitution to authorize the trial of crimes of the grade of misdemeanor without a jury, it had no constitutional right to take away the right to trial by jury from one class of persons only, namely, those within the jurisdiction of the Court of Special Sessions of the City of New York, while preserving it for all other persons within the state.

In consequence of this discrimination, a person accused of a misdemeanor is deprived of a jury trial within the City of New York, but is protected by a jury trial in every other part of the State. Thus, if the alleged misdemeanor occurs on Broadway south of 262nd Street in New York City, the accused is not entitled to a jury trial; but if the alleged offense occurs north of 262nd Street in the County of Westchester, the accused is protected by a jury trial.

The right to trial by jury is a very precious heritage of the common law. It is a fundamental safeguard of the liberties of free men, gained only after centuries of heroic struggle. Twice guaranteed in the Federal Constitution, it is a protection not lightly to be swept aside by act of a state legislature under cover of a questionable constitutional grant. Conceding, *arguendo,* that the provision of the New York Constitution above cited is not itself a violation of the rights vouchsafed to the citizen by the Federal Constitution, the authority granted thereunder can only be

valid if exercised wihout discrimination and made equally applicable to all persons within the State of New York. But the act of the New York legislature depriving the accused of a jury trial within the City of New York, while preserving that right to him in all other counties of the State, is clearly discriminatory, and the jurisdiction thus conferred is in violation of the guarantees of equal protection of the laws contained in Art. I, Sec. 11 of the Constitution of New York and in Art. XIV, Clause 1 of the Constitution of the United States. Here, again, since the question is jurisdictional, it may be raised at any time.

And it was raised vigorously by the petitioner on appeal. (Brief in Support of Motion for Reargument, N. Y. Court of Appeals, 58-59.) The absence of an exception at the trial does not preclude the raising of this issue on appeal, not only because the question is jurisdictional, but also because every court has inherent power to ignore an exception in the interests of justice and to protect constitutional rights. (*N. Y. Code of Criminal Procedure*, Section 527; *Devoy* v. *Irish World, etc.*, 208 N. Y. A. D. 319-321.)

POINT C.

The activities of the petitioner were beyond the jurisdiction of the Court and the scope of Sec. 270 of the New York Penal Law.

As noted above, the information charged this petition with "practicing as an attorney without being admitted and registered" (R. 23). This Court may take judicial notice of the fact that this charge, on which the information was predicated, was dropped by the prosecution, which conceded that Mr. Coyle had not practiced law (R. 375), and admitted that he was not charged "with illegally appearing in court or with performing other legal acts." (See Petition for Rehearing, Point 4.) The prosecution then

based its case on an entirely different offense, an alleged "holding out" as an attorney, stated only as a blind specification in the information, without the slightest indication as to the specific time or place or manner in which or the parties to whom the alleged holding out occurred. Instead, the prosecution alleged a continuous public conduct extending over nearly three years (R. 24).

The prosecution adduced seven surprise witnesses to prove its case, all of whom, with the sole exception of the *agent provocateur* Auerbach, testified that Mr. Coyle had not represented himself to them as a New York lawyer or counsellor; and even Auerbach admitted that the false story with which he sought to entrap Mr. Coyle concerned a Federal immigration matter which a layman could properly handle (R. 85-87, 92). The record is filled with Mr. Coyle's activities in Federal departmental and international matters, none of which had anything to do with the practice of law in New York. These were the only activities in which he was "continuously" engaged during the period covered by the information. The issue before this Court, which was duly raised on motion and exception by the petitioner (R. 1011-13) and clearly stated by Mr. Justice Dennis O'L. Cohalan of the New York Supreme Court in the Certificate of Reasonable Doubt granted by him to this petitioner, is the basic jurisdictional question as to whether the petitioner's continuous activities in Federal departmental and international matters come properly within the jurisdiction of a New York court or within the scope of Section 270 of the New York Penal Law.

We submit that the Court of Special Sessions of the City of New York has no jurisdiction to try and punish this petitioner for the exercise of a right given to him by the Federal Government, especially when, by the People's own admission, no practice of law in the State of New York was involved. The one independent judge on the trial tribunal emphatically protested that such acts did not come

within the scope of the New York law (R. 348, 379), and he accordingly voted to dismiss the information; while the other two judges, who were members of the prosecuting Association, voted to convict. As pointed out by Mr. Justice Cohalan in the aforesaid Certificate of Reasonable Doubt, counsel for neither side was able to find any court decision bearing on this jurisdictional question, which goes to the very essence of the case. The utter absence of any such decision or statute, or of any practice of New York law by the petitioner, compelled the prosecution and the interested majority of the court to infer an offense, and even—as the dissenting judge pointed out—to base inference upon inference (R. 368). In the words of a great dictum of this Court: "To create a crime by inference is a danger to civilization."

Since the activities of the petitioner, as alleged in the information, concerned Federal departmental and international matters outside the jurisdiction of the New York courts and Sec. 270 of the New York Penal Law, the conviction of the petitioner by a majority of the court raises a Federal question of jurisdiction and of denial of due process of law on which this Court should pass.

In this connection, we have carefully examined the contention in the respondent's brief herein (pp. 3-5) that the petitioner "rendered a variety of legal services" and "handled a variety of legal business". Aside from the fact that the respondent is bound by his own stipulation at the trial and his admission on appeal that the petitioner did not practice law, appear in court for others, or perform other legal acts (R. 375 and Respondent's Brief to App. Div., p. 3), we regret to state that the citations to the record contained in respondent's brief not only do not bear out his contentions, but flatly contradict them; and as shown in petitioner's Reply Brief (pp. 1-4), the activities referred to were in no way connected with the practice of law in New York. It is a weak case that needs to be bolstered before this Court by a distortion of the evidence.

POINT D.

The Trial Court should have dismissed the information as defective and insufficient on its face.

The information charged the petitioner with "practicing as an attorney without being admitted and registered" (R. 23), which is also the charge alleged by the respondent in his brief herein (p. 3). It was therefore incumbent upon the People to establish this charge beyond a reasonable doubt. Instead, the People entirely abandoned this charge at the trial and, as noted above, conceded that the petitioner did not practice law in the State of New York (R. 375). This in itself should have led the Court to dismiss the information. Instead, it proceeded to try the petitioner, not on the charge, but on the blind blanket specification that he had held himself out as being entitled to practice law. This sole specification was not contained in the charge, was at variance with it, and did not follow from it.

But even if, *arguendo,* the specification had been a proper one under the charge, the information was on its face insufficient in that it failed to apprise the petitioner as to the nature and cause of the specific illegal acts alleged against him, as set forth in Point A above.

The court therefore erred in refusing to dismiss the information when it was duly challenged by petitioner's counsel both at the outset of the trial and at its close (R. 53, 1011). Here, again, a federal question is raised as to the constitutional right of this petitioner to be duly informed in advance of trial as to the nature and cause of his alleged illegal acts.

Rosen v. *U. S.*, 161 U. S. 29;
Bartell v. *U. S.*, 227 U. S. 427.

POINT E.

There was no legal or competent evidence to support the judgment.

Since the charge in the information was that of practicing law (R. 23), the whole case fell flat when the prosecution conceded that "There is no claim that this defendant, in fact, practiced law" (R. 375). But accepting *arguendo* that an accused may be properly tried on a specification not implicit in and at variance with the charge, there was no legal or competent evidence before the court to warrant the interested majority in finding the petitioner guilty of the specification of holding himself out as entitled to practice law.

In his Petition for a Writ of Certiorari (pp. 5-8), petitioner has given the testimony of every witness for the prosecution on this point: Six out of seven swore that the petitioner had never represented himself to them, or to anyone else, as a New York lawyer, including even the government agent Zicherman, who went to the petitioner's office under a false name to entrap him (R. 131, 192-93). The sole witness who alleged that this petitioner had ever stated he was a New York lawyer was the government-employed *agent provocateur* Auerbach, who also went to petitioner's office with a false story, concerning a non-existent Federal immigration matter, seeking to entrap him (80-81, 85-87). Aside from the fact that the fictitious immigration matter had nothing whatever to do with the practice of New York law, Auerbach's testimony was legally inadmissible under the rule against entrapment, and constitutes no evidence in the eyes of the law. Entrapment, as the late Justice Holmes would say, is a dirty business. (*Olm-*

stead v. *U. S.*, 277 U. S. 438, 470); and evidence thus obtained is wholly insufficient to support a conviction.

Demarco v. *United States*, 296 Fed. 667;
Browne v. *United States*, 290 Fed. 870.

In the absence of other evidence, an acquittal should have followed as a matter of course. A conviction based on no legally competent evidence is without foundation and without due process of law.

United States v. *Lynch*, 256 Fed. 983.

Counsel for petitioner properly moved to set aside the conviction and for a new trial because the conviction was against the law and the evidence (R. 1011).

Conclusion.

This Court would have to seek far in its records to find another cause more deserving of review than the present one. Here there was undeniable deprivation of a fair trial by an impartial trial tribunal. The majority of that tribunal, consisting of members of the prosecuting Association, rode roughshod over the petitioner's constitutional right to be apprised of the specific accusations against him in advance of trial; and despite the repeated protests of the one independent judge on the tribunal, convicted him under a defective and insufficient information of activities entirely beyond the jurisdiction of the court and having nothing to do with the practice of law in New York. Not only was there an utter absence of any "clear, unequivocal and convincing evidence which does not leave the issue in doubt", but the only evidence given by any witness at the trial which at all supported the blanket specification in the information was legally incompetent under the rule against entrapment, irrelevant as dealing with a Federal immigration matter beyond the scope of New York law, and legally

insufficient to support a conviction. This Court has repeatedly held that the foregoing constitute Federal questions proper for its consideration and review.

For these and other reasons appearing in the record and the briefs on file herein, we submit to this Honorable Court that the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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